

[2023] PBRA 87

## Application for Reconsideration by Hall

### Application

1. This is an application by Hall (the Applicant) for reconsideration of a decision of a panel (the Panel) of the Parole Board dated 5 April 2023 (the Panel Decision) making no direction for the Applicant's release and making no recommendation for a progressive move to open conditions.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are the Panel Decision, the Application for Reconsideration of the Panel Decision, the email dated 25 April 2023 from the Public Protection Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) stating that no representations will be made in response to the Application for Reconsideration of the Panel Decision and the Applicant's dossier containing 591 pages.
4. The grounds for seeking reconsideration are that the Panel was irrational in not concluding that the Applicant's risk could be managed in the community because:
  - (a) The robust release plan which was "*extremely robust and would identify any warning signs before [the] risk would be imminent, and the robustness of the release plan would manage that*" (Ground 1).
  - (b) "*The risk of [the Applicant] reoffending is low*" (Ground 2).
  - (c) The Applicant has numerous protective factors present; (Ground 3).
  - (d) The Applicant "*evidenced a willingness and motivation to comply with the requirements of his license*" (Ground 4).
  - (e) The Applicant "*has evidenced that he is open and honest, and he has built up a relationship with professionals who would be managing him in the community*" (Ground 5).

### Background

5. On 9 March 1998, the Applicant, who was then 18 years old and who had no previous convictions, received a mandatory life sentence with a tariff of 13 years less the time served by the Applicant on remand following his conviction for the murder of a 76-year-old lady who was previously unknown to the Applicant. The Applicant had also committed a sexual offence against the victim.
  
6. The Applicant's account has changed over time in relation to his purpose for breaking into the victim's house and more recently he has confirmed that he broke into the house with the intent to commit a sexual offence. The Applicant has reported that he had been suffering with symptoms of depression for at least 12 months prior to him committing the index offence. There had been no obvious warning signs of his offending behaviour escalating when his "*level of violence and sexual violence was extreme*". The panel identified a non-exhaustive list of 15 potential risk factors of the Applicant.
  
7. The Panel noted several factors showing his progress including during his time in custody including that he had:
  - (a) Completed a significant number of accredited offending behaviour programs.
  - (b) Maintained his Enhanced status on the IEP regime with only 1 adjudication recorded against him and that was recorded in 2012.
  - (c) Not been involved in violent conduct in custody; and had
  - (d) Received many positive comments on his behaviour.
  
8. The Panel were concerned about some aspects of the Applicant's conduct including that:
  - (a) After completing the Core Sex Offenders Treatment Programme (Gore STOP programme), the Applicant was recommended to complete the Healthy Sexual Functioning (HSF) programme with particular focus on sexual fantasies, developing non-sexual interpretations of day-to-day situations and developing appropriate ways to counteract with women. The Applicant did not complete the HSF programme due to his obsession with an unhealthy attachment to the female facilitator which he could not understand was problematic. He only completed 11 out of the recommended 20 HSF sessions and he failed to modify his style of thinking.
  - (b) There were "*unanswered questions around his offending*" and the fact that "*professionals do not have a full understanding of why that offending took place*".
  - (c) The Applicant having disclosed a relationship with a member of prison staff in 2000, made inappropriate comments to a female officer in July 2000 "*telling her that she reminded him of an ex-girlfriend and behaving in an overly familiar way*" and then continuing to follow her around engaging her in conversation despite being informed that his behaviour was inappropriate.

- (d) In November 2015 writing a letter to his Offender Supervisor in which *"he made a direct threat to kill the teacher and suggesting that if he was not released from prison, he would assault sex offenders"*.
- (e) He showed a lack of insight into his behaviour together with his inability to recognize the inappropriateness of his behaviour and how they relate to future risk.
- (f) The fact that *"there is still no clear diagnosis, formulation or hypothesis to inform risk assessment [of the Applicant]"*.
- (g) The fact that *"all the professionals agree there is core risk reduction work outstanding"*.
- (h) The Applicant *"has failed to implement skills learned from interventions and has demonstrated behaviour that [has] crossed boundaries and has been inappropriate to female staff"*.
- (i) That *"there is no support for release or for a progressive move to open conditions from any professional"*.
- (j) That the Applicant's Community Offender Manager has concluded that *"without understanding the risks [of the Applicant] that need to be managed she is unable to confirm whether the proposed risk management plan is suitable [for the Applicant]"*
- (k) Using the Risk of Serious Sexual Violence Protocol (RSVP) assessment the Prison Psychologist assessed the Applicant as posing a high risk of sexual violence.
- (l) The protective factors of the Applicant would be his willingness to engage with professionals and completion of interventions, but it concluded that it was not an effective protective factor as the Applicant *"is not willing to engage with the proposed future treatment pathway and there remain concerns over the level of his insight into his risk and ability to apply skills outside the confines of the prison environment"*.

### **The Approach of the Panel**

9. A three-member Panel of the Board convened for an oral hearing at the prison on 2 August 2022 at which the Applicant was not legally represented and he was reminded of his right to representation, but he confirmed to the panel that he wished to continue without representation. Evidence was taken from the Prison Offender Manager and the Prison Psychologist.
10. The Applicant asked questions of the witnesses on his own behalf with the assistance from the Panel Chair. As the hearing progressed, the Panel formed the opinion that the Applicant was *"not presenting his case in the best light"* and would be assisted by legal advice. The Applicant's presentation *"indicated that he had deficits in social cues and communication difficulties to the extent that he was not aware his questions could be viewed by professionals and the panel in a disadvantageous way"*.
11. The case was adjourned for further information and directions issued for an assessment by a clinical psychologist with experience of developmental disorders and personality disorders.

12. The panel reconvened on 30 March 2023 with the same Chair and a Specialist member and a replacement third member. Full evidence was taken from all witnesses at the reconvened hearing.
13. The panel heard oral evidence from:
  - (a) The Applicant's Prison Offender Manager (POM).
  - (b) The Applicant's Community Offender Manager (COM).
  - (c) The Clinical Psychologist.
  - (d) The Prison Psychologist
  - (e) The Applicant.
14. At the reconvened hearing on 30 March 2023, the Applicant was not represented nor was the Respondent. A victim impact statement was provided, and it had been read by someone other than the victim at the initial oral hearing on 2 August 2022.
15. The Panel had to determine the significant question of whether it was necessary for the protection of the public for the Applicant to remain in custody. The Panel gave the Applicant full credit for the relevant offending behaviour work he had completed and the evidence of his conduct in closed conditions, but concluded there is core risk reduction work outstanding which must be completed in custody. This work would reduce the Applicant's risk which predominantly linked to personality disorder and to mental health and which in turn had links with his offending behaviour. The panel agreed with the professionals that the Applicant's risk could not be managed in the community unless and until he had completed a prolonged period of assessment in an appropriate environment with a multidisciplinary team of professionals to gain and understanding of the Applicant's presentation and how this linked to his risk and risk management.
16. Having considered the evidence, the Panel agreed with the professionals and concluded that it could not be satisfied that it was no longer necessary for the protection of the public that the Applicant should be confined.
17. The Panel then proceeded to consider whether to recommend the Applicant for a progressive move to open conditions. It decided that it could not make such a recommendation as the Applicant had not made sufficient progress during his sentence in addressing and reducing his risk to a level consistent with protecting the public while on temporary release as there were treatment needs outstanding in core risk areas. In addition, the panel could not be satisfied that the Applicant presented a low risk of abscond.

## **The Relevant Law**

### *Irrationality*

18. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at para.116,

*"The issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."*

19. This test was set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. The Divisional Court in **DSD** went on to indicate that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Parole Board in making decisions relating to parole. The Board, when considering whether to direct a reconsideration, will adopt the same high standard for establishing 'irrationality.' The fact that Rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

#### *Other*

20. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: *"there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontroversial and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning."* See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide *"objectively verifiable evidence"* of what is asserted to be the true picture.
21. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: *"It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of craftsmanship."*

#### **The reply on behalf of the Respondent**

22. PPCS stated in an email dated 25 April 2023 that the Respondent was not making any representations in response to the Applicant's reconsideration application.

## Discussion

23. In dealing with the grounds for reconsideration, it is necessary to stress five matters of basic importance. The first is that the Reconsideration Mechanism is not a process by which the judgment of the Panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his view of the facts in place of those found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.
24. The second matter of material importance is that when deciding whether a decision of the Panel was irrational, due deference has to be given to the expertise of the panel in making decisions relating to parole.
25. Third, where a Panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.
26. Fourth, when considering whether to order reconsideration, appropriate weight must be given to the views of the professional witnesses, but reconsideration cannot be ordered if the panel has put forward adequate reasons for not following the views of the professional witnesses.
27. Fifth, in many cases, there can be more than one decision that a panel can be entitled to arrive at depending on its view of the facts.

## Ground 1

28. This ground is that the Panel was irrational in not concluding that the Applicant's risk could be managed in the community because the robust release plan was *"extremely robust and would identify any warning signs before [the] risk would be imminent, and the robustness of the release plan would manage that"*.
29. There are several reasons why reconsideration cannot be ordered on this ground. First, there was evidence that the Panel considered the release plan and whether it would manage the risk posed by the Applicant in the community before explaining that it was not confident that the warning signs of an escalation in risk would be observable to professionals as they did not have a full understanding of the risk posed by the Applicant and so they would be unaware on what constituted warning signs.

30. Second, the Psychologist explained that she had then no greater understanding of the Applicant's motivation of the index offence since the completion of the accredited programmes and without understanding the risks that need to be managed, she was unable to confirm whether the proposed risk management plan is suitable.
31. Third, there remained uncertainty among the professionals about the risks of the Applicant that needed to be managed and this means that they had to be uncertain if the release plan would identify warning signs.
32. Fourth in any event, due deference must be given to the expertise of the Panel in making decisions relating to parole and that would be an additional reason for rejecting this complaint especially as none of the professionals took the view that the Applicant could be safely released.
33. Finally, in those circumstances, it cannot be irrational for the Panel not to have concluded that the risk plan would be extremely robust and would be robust enough to manage the risk posed by the Applicant bearing in mind the high standard required for showing irrationality as explained in paragraph 17 above.

## **Ground 2**

34. This ground is that the Panel was irrational in not concluding that the Applicant's risk could be managed in the community because "*the risk of [the Applicant] reoffending is low*" and in consequence the Panel was irrational in not concluding that his risk could be managed in the community. There are several reasons why reconsideration cannot be ordered on this ground.
35. First, the evidence adduced before the Panel was that the Applicant had "*engaged with a host of psychological and psychiatric assessments during his time in custody [but] there is no clear diagnosis, formulation or hypothesis to inform risk assessment*" and so the panel was not entitled to consider that the reoffending risk of the Applicant was low.
36. Second, there was much evidence that the risk of reoffending was not low. The Prison Psychologist assessed the Applicant as posing a "*high risk of sexual violence*" using the RSVP assessment. Nothing has been put forward to suggest, let alone establish, that this conclusion was wrong.
37. Third, there was a consensus among professionals that the Applicant has outstanding treatment needs were directly linked to his offending and his risk of future evidence and/or sexual violence cannot be managed in the

community on ROTLs or on release. This consensus is totally contrary to the assertion that the risk of the Applicant reoffending is low.

38. Fourth, in any event, due deference must be given to the expertise of the Panel in making decisions relating to parole and that constitutes an additional reason for rejecting this complaint especially as none of the professionals took the view that the Applicant could be safely released.

39. Finally, in those circumstances, it cannot be irrational for the Panel not to conclude that the risk of the Applicant reoffending was low bearing in mind the high standard required for showing irrationality as explained in paragraph 17 above.

### **Ground 3**

40. This contention is that the Panel was irrational in not concluding that the Applicant's risk could be managed in the community because "[the Applicant] has numerous protective factors present". There are several reasons why reconsideration cannot be ordered on this ground.

41. First, the Panel identified a possible protective factor for the Applicant to be "[his] willingness to engage with professionals and completion of interventions" but it concluded that it was not an effective protective factor when it concluded that [the Applicant] is not willing to engage with the proposed future treatment pathway and there remain concerns over the level of his insight into his risk and ability to apply skills outside the confines of the prison environment".

42. Second, the Panel also noted that the Applicant had support from his siblings but "it is not yet known whether his siblings are protective as well as supportive."

43. Third, it is not contended by the Applicant (let alone proved) that the Panel's comments set out in paragraphs 40 and 41 above are not correct.

44. Fourth, in any event, due deference must be given to the expertise of the panel in making decisions relating to parole and that is an additional or an alternative reason for rejecting this complaint especially as none of the professionals took the view that that the Applicant could be safely released.

45. In those circumstances, it cannot be irrational for the Panel not to conclude that the Applicant has numerous protective factors bearing in mind the high standard required for showing irrationality as explained in paragraph 17 above.



**Ground 4**

46. This contention is that the Panel was irrational in not concluding that the Applicant "*evidenced a willingness and motivation to comply with the requirements of his license.*" Reconsideration cannot be ordered on this ground for the following reasons:
47. First, the Panel explained that clear pathways have been identified for the Applicant, but it has been his unwillingness to engage with these pathways that has prevented progress.
48. Second, the Panel concluded that the Applicant has failed to implement skills learned from interventions and has demonstrated behaviour that has crossed boundaries and been inappropriate to female staff.
49. Third, another conclusion of the Panel was that the Applicant has "*demonstrated concerning obsessive behaviour in relation to females and a lack of awareness of his own inappropriate behaviours.*"
50. Fourth, the Panel explained that there were occasions when the Applicant struggled to implement skills learned particularly when experiencing obsessive thinking, grievous thinking or sexual preoccupation.
51. Fifth, it has not been contended by the Applicant (let alone proved) that the Panel's comments set out in paragraphs 46 to 49 are not correct or that the Panel was not entitled to reach those conclusions.
52. Sixth, in any event, due deference must be given to the expertise of the Panel in making decisions relating to parole and that constitutes an additional reason for rejecting this complaint especially as none of the professionals took the view that the Applicant could be safely released.
53. Finally, in those circumstances, it was not irrational for the Panel not to conclude that the risk of the Applicant reoffending was low bearing in mind the high standard required for showing irrationality as explained in paragraph 17 above.

**Ground 5**

54. This ground is that the Panel was irrational in not concluding that the Applicant's risk could be managed in the community because the Applicant "*has evidenced that he is open and honest, and he has built up a relationship with professionals who would be managing him in the community.*" Reconsideration cannot be ordered on this ground for the following reasons:

55. First, the Applicant was recommended to undertake the HSF programme with particular focus on sexual fantasies, developing non-sexual interpretations of day-to-day situations and developing appropriate ways to deal with women. But he did not complete the programs due to his unhealthy attachment and sexual attachment to his female facilitator with whom he became obsessed. This showed that he was not building up appropriate relationships with professionals.
56. Second, the Applicant developed an unhealthy interest in his female Offender Supervisor and his case was transferred to a male Offender Supervisor. This unhealthy relationship showed an inappropriate relationship with a professional managing him.
57. Third, the Applicant behaved inappropriately to members of prison staff including by making inappropriate comments including to a female officer in July 2020 *"telling her that she reminded him of an ex-girlfriend and behaving in an overly familiar way"* and then continuing to follow her around engaging her in conversation despite being informed that his behaviour was inappropriate.
58. Fourth, in November 2015, the Applicant wrote a letter to his Offender Supervisor in which *"he made a direct threat to kill the teacher and suggesting that if he was not released from prison, he would assault sex offenders."*
59. Fifth, it has not been contended by the Applicant (let alone proved) that the Panel's comments set out in paragraphs 54 to 57 above are not correct.
60. Sixth, in any event, due deference must be given to the expertise of the panel in making decisions relating to parole and that constitutes an additional or an alternative reason for rejecting this complaint especially as none of the professionals took the view that the Applicant could be safely released.
61. Finally, in those circumstances, it cannot be irrational for the panel not to conclude that the risk of the Applicant reoffending was low bearing in mind the high standard required for showing irrationality as explained in paragraph 17 above.

## **Conclusion**

62. For all these reasons, this application for reconsideration must be refused.

**Sir Stephen Silber**  
**11 May 2023**